



**REPUBLIC OF MALAWI**  
**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CIVIL CAUSE NO. 386 OF 2021**

**BETWEEN**  
**KAMPHINDA GOWA NYASULU.....CLAIMANT**  
**AND**  
**ROCKSIZER MINING CONTRACTORS LIMITED.....DEFENDANT**

**CORAM: HONOURABLE JUSTICE WILLIAM Y. MSISKA**

Mr. N. Chiume, of Counsel for the Claimant

Mr. I. Mphote, of Counsel for the Defendant

Mr. F. Dzikanyanga, Court Clerk

**ORDER**

This is an order of this Court on an application by the Defendant for the discharge of an interlocutory order of injunction made under Order 10 rule 27 of the Courts (High Court) (Civil Procedures) Rules, 2017.

On 25<sup>th</sup> May, 2021 the Claimant commenced the proceeding against the Defendants seeking, among others, reliefs such as possession of property situated at Jidi Village (**for the purposes of these proceedings, I will use Jidi Village instead of Tidi Village because it is the one appearing on the court documents**) in the area of Traditional Authority Chimutu; mesne profits at the rate of K50,000,000 per month; damages for trespass and costs of the action. On the same day, the Claimant applied for an interlocutory order of injunction pursuant to O.10 rule 27 CPR, 2017 to restrain the Defendant from trespassing, entering or interfering in any way with property at Jidi Village belonging to the Claimant. On 26<sup>th</sup> May, 2021, I granted the application by the Claimant for an order for interlocutory injunction.

By the instant application the Defendant seeks to discharge the order of interlocutory injunction obtained by the Claimant. On the day of hearing of the application, I discharged the interlocutory order of injunction and undertook to provide my reasons later, which I now do.

The Claimant opposed the application for discharge of the order of interlocutory injunction.

The case of the Defendant according to the sworn statement of Mukesh Makadia who is the Operations Manager in the employ of the Defendant is that the Claimant did not disclose that Kamvula Quarry on which the Defendant are mining was in existence as early as 1986 before the Claimant's land was leased to Mr. Anderson Lemon Makata in 2003. Mr. Anderson Lemon Mataka was the predecessor in title. At the time the predecessor in title was applying for lease of the land in question, the Consultation with Chiefs Form clearly indicated that the land is at Tidi Village near Kamvula Quarry.

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He stated that the Defendant was given the first licence to mine in 1996 way before the land was offered for lease to the predecessor in title. It was his further statement that these facts were brought to the attention of the Claimant by the Commissioner for Mines and Minerals through his letter dated 20<sup>th</sup> August, 2020.

He stated that at the time the predecessor in title was being given the offer letter for lease dated 12<sup>th</sup> May, 2003, Kamvula Quarry Mine was already in operation. The deponent also stated that the Defendant was granted the first licence to mine Kamvula Quarry in 1996. This was way before the offer of the lease was approved. Since then, the Defendant has had several renewals of the licence. The recent one being that of August, 2019.

He added that according to law, it is the Government of the Republic of Malawi that issues mining licences to individuals or institutions for a specific period. For an individual or institution to undertake quarrying activities, what is more important is the valid licence. It is not necessary for the person holding a mining licence to show that he owns the land on which the mine stands or is situated.

The Defendant through Mr. Makadia disputed the allegation that the Claimant obtained a writ of possession against the Defendant in 2020. According to him, the Defendant was never served with any court process regarding the writ of possession. From the writ of possession, it is clear that the Defendant was not at all cited as a party. If indeed, the Defendant was a party to the proceedings that led to the writ of possession, then it would be appropriate to describe the present proceeding as an abuse of court process. Otherwise, the Claimant should have proceeded to enforce the writ of possession.

The Defendant further stated that it has heavily invested on the quarry mine over a long period of time and that payment of salaries depend on the active operations of

the mine. The Defendant has contractual obligations with about 14 companies for the supply of quarry and other related products. For that reason, as well, the balance of convenience should tilt in favour of vacating the injunction so as to maintain the status quo ante.

The Claimant opposes the application and is of the view that the interlocutory order of injunction should not be discharged. He has placed reliance on his sworn statement in support of the application for injunction. The Claimant stated that he is the owner of 108.48 hectares of leasehold land situated at Jidi Village.

The Claimant in his statement said that he started the process of acquiring the property under Deed Number 79358 from Mr. Dellopeter Mataka in 2010 at the price of K2, 000,000. The process was concluded upon the registration of the Deed of Assignment in favour of the Claimant. Before the sale was concluded, the Claimant noted that there were trespassers on the property and Mr. Dellopeter Mataka took up the issue with Lilongwe District Assembly. Following the discussions with Lilongwe District Assembly, Traditional Authority Chimutu was directed to advise all trespassers to vacate the said property as it was the subject of lease.

The Claimant further stated that due to non-compliance by the trespassers with the directives of the Lilongwe District Assembly, Mr. Dellopeter Mataka obtained a writ of possession on 21<sup>st</sup> January, 2010. It was only after the grant of the writ of possession that the trespassers vacated the property. It was also at that time that he took over full ownership. The Claimant further averred that in October, 2013, he was issued with a licence and consent by the Ministry of Lands in respect of the property. After fully acquiring the land and receiving the licence and consent, he

intended to start his project of building an estate on the land. For that reason, he had plans for an estate which was to be built on the land drawn up by architects. He also stated that without express or implied consent and/or knowledge the Defendant began to trespass on his property in the year 2019. As a result, the Defendant has been mining quarry from the Claimant's property without his consent and/or knowledge for the past 2 years, causing great destruction to the property and the surrounding areas. Consequently, that the Claimant has been warning the Defendant of the trespass but it has been to no avail.

The Claimant also continued to state that he conducted several searches at the Ministry of Lands and that the results have shown that he owns the 108.48 hectares of land located at Jidi Village registered in the Deeds Registry as deed entry number 86858. Consequently, it is clear that there is nothing on record to entitle the Defendant to any legal or equitable interest in the absence of any express or implied consent or authorization for the Defendant to occupy or use the land in question.

He therefore sought a continuation of the order of injunction that he obtained *ex parte* in this matter contending that if not stopped the Defendant will continue to occupy the land and continue to extract quarry from the land which is adverse to the wishes and purpose for which the Claimant acquired the land.

The Defendant argued that the main contention that it has is that the Claimant suppressed material facts when obtaining the order of interlocutory injunction in *ex parte* (in the absence of the defendant). The Defendant, firstly, contended that the Kamvula Quarry mine was already in operation at the time the predecessor in title to leasehold land made the application for lease. In the Consultation with Chief

Form, the predecessor in title at the time he was applying for the lease indicated that the piece of land is near Kamvula Quarry. In fact, Kamvula Quarry mine was opened in 1988 by the then Ministry of Transport and Public Works (**just a historical correction that at that time it was known as the Ministry of Works and Supplies**).

The Defendant was granted a Mining Licence Number ML 0052 on 6<sup>th</sup> May, 1996 and thereafter took over the operation of Kamvula Quarry Mine from the Government. This information was part of the response to the request by the Claimant to have the Commissioner for Mines revoke the licence of the Defendant with respect to Kamvula Quarry.

It was, further, the argument of the Defendant that the phrase “near Kamvula Quarry” clearly denotes, and means that Kamvula Quarry was not within the land belonging to the Claimant but rather close to that land.

The Claimant on the other hand maintained what is contained in the sworn statement and urged the Court not to discharge the order of interlocutory injunction as he did not suppress any material facts.

This Court is aware that a party will not be allowed to benefit from an *ex parte* interlocutory order of injunction obtained upon suppression of material facts. *See Vitsitsi v Vitsitsi [2002-2003] MLR 419.*

As correctly contended by the Defendant, an order obtained *ex parte* upon suppression of material facts will be set aside. The question whether a fact not disclosed is sufficiently material to justify the discharge of an interlocutory order of injunction depends on the importance of the fact to the issues to be decided. The test is, has the failure to disclose material facts known to the claimant led the court

to give a decision that it could not have given if all the material facts had been disclosed? If the answer is in the positive, then the court must as a matter course set aside the injunction. *See Chiume and Others v Alliance for Democracy (AFORD) and Another [2005] MLR 88.*

In the matter at hand, the Claimant indeed did not disclose that the land in issue is near Kamvula Quarry. The Claimant also did not disclose that he requested the Commissioner for Mines to revoke the licence granted to the Defendant to operate Kamvula Quarry. The Claimant gave the impression that Kamvula Quarry is within the land in question. However, as pointed out by the Defendant and supported by the exhibits, Kamvula Quarry does not form part of the leasehold land belonging to the Claimant. Kamvula Quarry is only close to the land that belongs to the Claimant.

It was, therefore, misleading for the Claimant to state that the Defendant was trespassing on his land by operating Kamvula Quarry. The Defendant is operating Kamvula Quarry which is near the leasehold land belonging to the Claimant. The Defendant is carrying out the operation legally under a licence issued in accordance with the provisions of the Mines and Minerals Act.

For that reason, this Court finds as a fact that the Claimant suppressed the material fact that Kamvula Quarry forms part of his leasehold land or is within that land. He misled the Court into believing that he owns all the land including Kamvula Quarry, and that in operating Kamvula Quarry the Defendant was trespassing on his land. To the contrary, this was, in fact, not the case.



The Claimant cannot be allowed to benefit from an *ex parte* order obtained upon suppression of material facts as that would not be just. *Ex parte* orders of interlocutory injunction are granted only where it is just so to do. In particular, the Claimant is required to make a full and frank disclosure of all material facts including those facts he may deem unpalatable or unfavourable to his case. *See Order 10 rule 27 CPR, 2017.*

In light of the foregoing, the *ex parte* order of interlocutory injunction granted to the Claimant herein is accordingly is discharged on the ground that there was suppression or non-disclosure of material facts at the time the Claimant sought the order.

Costs are for the Defendant.

**MADE** in Chambers this 3<sup>rd</sup> day of August, 2021 at Lilongwe.



W.Y. MSISKA

**JUDGE**